IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1825 of 1994

with

MISC CIVIL APPLICATION No 292 of 2004
in
SPECIAL CIVIL APPLICATION No 1825 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT STATE ROAD TRANSPORT CORPORATION
Versus
THAKOREBHAI BHUDARBHAI BAROT

Appearance:
1. Special Civil Application No. 1825 of 1994
MR PRANAV G DESAI for Petitioner No. 1
NOTICE SERVED for Petitioner No. 1
MR KM PATEL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 25/03/2004

ORAL JUDGEMENT

ORDER IN MISC.CIVIL APPLICATION NO.292 / 2004

Heard learned advocate Mr.P.G.Desai on behalf of the applicant - original petitioner and learned advocate Mr.K.M.Patel for respondent - workman.

This application is filed with prayer to recall the order passed by this Court on 19th February, 2004. Considering the averments made in the application and submissions made by the learned advocates for the parties, order passed by this Court on 19th February, 2004 is recalled and Special Civil Application No.1825 / 1994 is restored to original file with all attached orders.

Accordingly, present MCA stands disposed of accordingly.

JUDGMENT IN SPECIAL CIVIL APPLICATION NO.1825 / 1994

Today, this Court has restored this petition to its original file and number with all attached reliefs and since the matter is of the year 1994, at the joint request, the matter is heard finally and being disposed of by this judgment.

Heard learned advocate Mr.P.G.Desai on behalf of the petitioner and learned advocate Mr.K.M.Patel for respondent - workman.

In the present petition, the petitioner corporation has challenged the award passed by the Industrial Tribunal, Ahmedabad in Complaint No.22 / 1988 in Reference [IT] No.58 / 1988 dated 15th February, 1993 whereby the tribunal has directed the Corporation to pay full wages with all consequential benefits to the respondent for the period from 29th February, 1988 to 29th February, 1990. Initially, this Court has issued Rule and notice as to interim relief and mean while, granted ad-interim relief in terms of Para-12[B] vide order dated 19th February, 1994 and subsequently, by order dated 8th April, 1994 that ad-interim relief is confirmed by this Court staying the operation of the award in question.

The brief facts giving rise to the present petition are as under :

The respondent workman was working as Conductor in Matar Taluka Transport Company and thereafter, he was taken in service by the corporation on 13th March, 1949. It is case of the respondent that he was absorbed by the Corporation as private operator and in pursuance of the settlement arrived at between the Union and Corporation, he is entitled to be in service till the age of superannuation 60 years and he should not have been superannuated at the age of 58 years. The service period of two years has been granted by the Corporation in favour of the private operators those who have been absorbed at the time of nationalisation of the transport companies. The respondent has been retired from service by the Corporation on 29th February, 1988. Therefore, industrial dispute has been raised by the respondent with a demand to continue the respondent in service upto completion of 60 years. That Reference [IT] No.58 / 1988 was pending, meanwhile, date of retirement at the age of 58 year has come and therefore, he filed complaint [IT] No.22 / 1988 before the industrial tribunal, Ahmedabad. In complaint, the prayer is, now he is retiring from service at the age of 58 years and he is entitled the benefit to remain in service upto 60 years and seeking this relief, the complaint is filed during pendency of the main Reference under Section 33-A of the I.D.Act, 1947. The Corporation has filed reply against the complaint. Thereafter, the respondent was examined before the Industrial Tribunal vide Exh.26 and one witness Ahemadkhan Gulabkhan Pathan was examined vide Exh.28. However, no witness has been examined by the Corporation. Thereafter, the tribunal has examined the matter on the basis of the record which was available with him and the tribunal has appreciatd the oral evidence of the respondent as well as his witness and considering non production of amalgamation agreement by the Corporation and considering the non-examination of any witness by the Corporation, the tribunal has relied upon the evidence of the respondent as well as his witness and came to the conclusion that the respondent was taken in service as private operate from Matar Transport Service and therefore, he is entitled to benefit of age of superannuation till 60 years as per the agreement arrived at between the Corporation and the Unions. Accordingly, benefit has been directed to be paid to the respondent by the Corporation for a period of two years.

Learned advocate Mr.P.G.Desai for the petitioner Corporation has submitted that complaint under Section 33-A of the Act is not maintainable as Section 33 has not

been violated by the Corporation. He also submitted that the respondent was not absorbed from Matar Taluka Transport Company and he was taken in service as fresh employee on the basis of his application on 13th March, 1949. Therefore, when he was not absorbed at all by the Corporation, then he is not entitled to benefit of 60 years. He also submitted that service book of four persons including the respondent has been produced on record by the corporation but the tribunal has not considered the same. He also emphasised that the tribunal has not properly dealt with the matter as per the evidence available with the tribunal and committed error in coming to the conclusion that the respondent was absorbed by the Corporation and entitled for the benefits.

Learned advocate Mr.K. M. Patel for the respondent workman has submitted that it was not the contention raised before the tribunal by the corporation about breach of Section 33 of the Act at the time of arguments by the Corporation before the tribunal. He also submitted that no such submission has been made by the Corporation that service book of four persons produced wherein there is evidence of not absorbing the respondent from Matar Taluka Transport Company. He also submitted that the Corporation has not examined any witness and the evidence of two persons, viz. the respondent and his witness have been rightly relied upon by the tribunal in absence of the evidence from the Corporation. He also submitted that the documents which is referred by the learned advocate Mr.Desai about service book of four persons, for which, no reference has been made by the Tribunal in the entire body of the order. Not only that, no such contention has been raised by the Corporation even in the memo of this petition that documents though produced, not considered by the Tribunal. Therefore, he submitted that no record has been produced by the Corporation though it might be available with them in their file but it was not produced before the tribunal, therefore, that record cannot be considered by this Court at this stage. He also submitted that witness Mr.Pathan who was examined vide Exh.28 categorically deposed that these four persons were working together in Matar Taluka Transport Company and all the workmen were absorbed by the corporation and except respondent, all three workmen were already given benefit of age of superannuation upto 60 years. This fact has not been denied by the Corporation before this Court. Therefore, learned advocate Mr. Patel submits that the tribunal has rightly appreciated the evidence and rightly come to the conclusion, for that, the

tribunal has not committed any error and as such, no inference of this Court is warranted while exercising the powers under Article 227 of the Constitution of India.

I have perused the award impugned in this petition and given my consideration to the submissions made by the learned advocates for the respective parties. The question is, whether the respondent has been absorbed as private operator in the corporation or not. The corporation denied this fact. But no details and evidence produced by the Corporation before the Tribunal. The Corporation having all the materials, as against that, respondent is not having any material to prove the fact that he was absorbed by the Corporation. Therefore, he examined one witness Mr.Pathan at Exh.28 and said Shri Pathan has specifically deposed before the Tribunal that Bhawani Prasad and Sufi Miya both were working with him and the respondent. He also deposed before the tribunal that the respondent was also working with him. It was also deposed before the tribunal that the respondent was also working with him and said Bhagwati Prasad and Safi Miya both were given benefit of 60 years and some other benefits were also given but he had not accepted the same on account of ill health of said witness. It is necessary to note that evidence of this witness remained unchallenged as the corporation has not cross examined the said witness Mr.Pathan vide Exh.28. The respondent also deposed before the tribunal that he was working with Matar Taluka Transport Company and he produced certificate Annexure-E along with the complaint from the Managing Director of Matar Taluka Transport Company to the effect that the respondent workman was working with the transport company. Therefore, this was the only evidence available with the tribunal and from Corporation side, no evidence has been produced to disprove or controvert the said fact which has been deposed by the respondent and his witness. Therefore, in such circumstances, the tribunal was having no other option but to believe the evidence of said two witnesses including the respondent. Learned Advocate Mr.Desai has raised contention that the breach of Section 33 has not been established by the Respondent but it is equally important to consider whether such contention was pressed into service or not by the petitioner at the time when submissions were made. In Para-5 of the award, submissions made by the learned advocate Ms. Meena Shah have been recorded and in her submissions, no such contention has been raised that breach under Section 33 has not been established. No contention about documents referred to by the learned advocate Mr.Desai has been raised. No submission with regard to four service books

produced by the Corporation and it is relevant when, in the service book of the respondent, no endorsement is made about absorption from the private operator. Therefore, only submission made that he was not absorbed from the transport company and he was rightly superannuated by the Corporation. Further submissions made by the learned advocate Ms. Meena Shah was that it was the duty of the respondent to prove the demand that he was absorbed from the private operator. According to her submission, the respondent has not proved this fact and therefore, the complaint was required to be dismissed. In respect of this submission, it is very difficult to make out the case that he has been absorbed by the Corporation from private company because no such document available with the respondent. At that relevant time, the agrement was available with the transport company and the list of the workmen where how many has been absorbed, are the record available with the corporation. In such circumstances, the corporation should have produced relevant materials and disprove the facts mentioned by the respondent workman. No such efforts have been made by the Corporation before the Tribunal. In respect of service book also, no such submission made at the relevant time and even no such contention raised in the petition. In such circumstances, normally, in written statement, other side raises number of contentions to challenge the plaint or petition by raising all the available legal contentions. But no such efforts have been made by the Corporation before Tribunal. In respect of service book also, no such submission made at the relevant time and no such contention has been raised in the petition. In such circumstances, the Court has to consider the contentions and submissions which are pressed into service at the time of oral submission. These are only relevant consideration and the Court is not duty bound to take into considerations all the contentions raised in the written statement by the respondent.

Therefore, considering this aspect, the Court has to consider only submissions made before the Court while submitting the case but if the contention is not raised, meaning thereby, that contention is not pressing into service. In such circumstances, it is open for the petitioner to file proper application before the tribunal either to review or seeking clarification. That view has been taken by the Apex Court in case of DAMAN SINGH AND OTHER V. STATE OF PUNJAB AND OTHERS reported in AIR 1985 SC 973. The relevant observations made in para-13 are referred as under :

"13. The final submission of Shri Ramanurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumberable grounds in the petitions and memorandum of appeal etc., but later, confine themselves, in the course of arguments to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the questing whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not ?"

The observation made by the Apex Court that it is not unusual for parties and counsel to raise innumerable grounds in the petitions and memorandum of appeal etc., but later, confine themselves, in the course of arguments to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not ?

Therefore, in view of the Apex Court judgement referred to above, this Court cannot inquire the fact whether such contention was raised by the corporation before the tribunal or not. Whatever contentions have been raised, are reflected in para-5. Except that, there is nowhere contention of the Corporation has been taken by the tribunal, meaning thereby, this Court has to consider only contentions which have been enumerated by the Tribunal in para-5 and this Court cannot go into the

question which has been taken for the first time by the Corporation before this Court.

In respect of the contention raised by the learned advocate Mr.Desai that service book of four persons were produced vide Exh.11 to 14 by the Corporation including service book of the respondent but the Tribunal has not considered the said record. I have perused the entire award but nowhere it is mentioned or referred the documents produced by the Corporation and even the Corporation has also not referred the said documents even in their submission. Therefore, if the documents really produced by the Corporation and such documents have not been considered by the Tribunal, then, it was open for the corporation at the relevant time to file such application before the Tribunal, otherwise, this Court has to consider only the order and this Court cannot doubt against the judicial pronouncement given by the competent Court. This aspect has been examined by the Apex Court in case of STATE OF MAHARASHTRA V. RAMDAS SHRINIVAS NAYAK AND ANOTHER reported in AIR 1982 SC 1249, wherein the Apex Court has observed in para-4 that;

> "4. .... We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." We are bound to accept the statement of the Judges recorded in their judgement, as what transpired in the Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject."

In view of above observations made by the Apex Court that if certain documents referred by the learned advocate Mr.Desai produced by the Corporation then, they should have approached the tribunal immediately with grievance that nowhere in the award, the same have been referred to. Otherwise, this Court has to presume that such record was not at all produced by the Corporation because this Court has to consider the award as it is and correctly reflected the record of the proceedings. Therefore, this Court cannot consider even that submission about service book of four persons including

the respondent. Therefore, that contention cannot be accepted by this Court.

I have perused the finding given by the tribunal in para-6. The tribunal has relied upon the evidence Exh.7/2 application made by the respondent wherein he was appointed on 11th March, 1949 and he was working with Matar Taluka Transport Company. The tribunal has also observed that the respondent was taken in service with experience in Matar Taluka Transport Company, then the Corporation should have given such appointment order but the Corporation has not produced any appointment order of the respondent. The tribunal has considered certificate which has been given by the Managing Director of Matar Taluka Transport Service and also considered oral evidence of witness Mr.Pathan vide Exh.28 and come to the conclusion that the respondent was also absorbed along with said Shri Bhagwati Prasad and Safi Miya as private operators and therefoer, he entitled to benefit of settlement arrived at between the corporation and Union and to work upto 60 years and that benefit has not been given by the Corporation, meanwhile, the respondent was made to retire from service on 28th February, 1988 and therefore, the tribunal has granted monetary benefits in favour of the respondent. Therefore, according to my opinion, there is no error apparently found on the face of record committed by the tribunal. This Court has limited jurisdiction under Article 227 of the Constitution of India to interfere with the finding recorded by the tribunal and even two views are possible, this Court has limited jurisdiction to interfere with in case when apparently there is no error committed by the tribunal. Therefore, according to my opinion, there is no substance in the present petition and same deserves to be dismissed and it is dismissed accordingly.

Rule stands discharged with no order as to costs. Interim relief, if any, stands vacated.

Learned advocate Mr.K.M.Patel for the respondent workman at this stage submits that this is very old petition of the year 1994 and when this Court has confirmed the award in question but since the stay is operating since last more than ten years against the respondent workman, he is not able to get benefit flowing from the award. He also submits that in the year 1988 the respondent workman was aged 58 years and now he has attained the age of about 75 years and the respondent is senior citizen and ten years have elapsed after the award, his request is some suitable directions may be issued on the petitioner to comply with the award in

question so that the respondent can enjoy the fruits. However, learned advocate Mr.Desai has strongly objected this prayer made by the learned advocate Mr.Patel and submits that this Court cannot issue direction in the petition filed by the petitioner corporation.

However, considering the facts and circumstances and the fact that petitioner is aged 75 years and lapse of ten years after award and the award in question has been stayed on account of stay granted by this Court, in the interest of justice, some suitable directions deserve to be issued on the petitioner to comply with the award in question and shall accordingly pay the full wages to the respondent including all consequential service benefits for the period from 29th February, 1988 to 29th February, 1990 as per the directions issued by the tribunal
months from the date of receipt of copy of this order.

Direct Service permitted to respondent.

Date : 25.3.2004 [H.K.Rathod, J.]

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